

MORIARTY, PAETZOLD & SHERWOOD

ATTORNEYS AT LAW

2230 MAIN STREET – P.O. BOX 1420
GLASTONBURY, CONNECTICUT 06033

DAVID F. SHERWOOD
dfsherwood@gmail.com

TELEPHONE (860) 657-1010
TELECOPIER (860) 657-1011

October 26, 2022

Attorney Melanie Bachman, Executive Director
Connecticut Siting Council
10 Franklin Square
New Britain, CT 06051

Reference: Connecticut Siting Council Docket No. 509 -Application of Homeland Towers, LLC for a Certificate of Environmental Compatibility and Public Need for the Construction, Maintenance and Operation of a Telecommunications Facility at 1837 Ponus Ridge Road, New Canaan, Connecticut

Dear Attorney Bachman:

Please find enclosed an original and 15 copies of a Post-Hearing Brief and Proposed Factual Findings dated October 26, 2022, for the JMB parties.

We appreciate the careful consideration that Siting Council and its staff have given to this matter.

Very truly yours,

MORIARTY, PAETZOLD & SHERWOOD



David F. Sherwood

/mds

cc: Service List
Mark Buschmann
Jamie Buschmann

STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

IN RE:	:	
APPLICATION OF HOMELAND	:	DOCKET NO. 509
TOWERS, LLC FOR A CERTIFICATE	:	
OF ENVIRONMENTAL	:	
COMPATIBILITY AND PUBLIC NEED	:	
FOR THE CONSTRUCTION,	:	
MAINTENANCE AND OPERATION	:	
OF A TELECOMMUNICATIONS	:	
FACILITY AT 1837 PONUS RIDGE	:	OCTOBER 26, 2022
ROAD, NEW CANAAN,	:	
CONNECTICUT	:	

**POST HEARING BRIEF OF PARTIES MARK BUSCHMANN, TRUSTEE AND JAMIE
BUSCHMANN, TRUSTEE, AND MARK BUSCHMANN, INTERVENOR**

This post-hearing brief is submitted on behalf of parties Mark Buschmann, Trustee, and Jamie Buschmann, Trustee, and Mark Buschmann, intervenor under the Connecticut Environmental Protection Act, C.G.S. §§ 22a-14 et seq. (“CEPA”), to set forth the factual and legal grounds why the captioned application should be denied.

I. PRELIMINARY PROCEDURAL MATTERS

A. Standing

In response to their May 6, 2022 notices, the Siting Council granted party status to Mark Buschmann, Trustee and Jamie Buschmann, Trustee at its meeting of May 26, 2022. In response to his “Verified Petition to Intervene as a Party under General Statutes § 22a-19 (a),” the Siting Council granted Mark Buschmann CEPA intervenor status on May 26, 2022. Pursuant to C.G.S §16-50n(c), the Siting Council grouped Jamie Buschmann, Trustee, Mark Buschmann, Trustee and Mark Buschmann

(hereinafter, sometimes the “JMB parties”). (Council Decision on Buschmanns’ Request for Party/CEPA Intervenor Status, 5/27/22)

Mark Buschmann, Trustee and Jamie Buschmann, Trustee have party status in this proceeding. Mr. Buschmann has CEPA intervenor status in this proceeding.

B. Burden of Proof

The applicant to an administrative agency bears the burden of proof. *Samperi v. Inland Wetlands Agency*, 226 Conn. 579, 593 (1993). "It is an elementary rule that whenever the existence of any fact is necessary in order that a party may make out his case or establish his defense, the burden is on such party to show the existence of such fact." (Internal quotation marks omitted.) *Zhang v. Omnipoint Communications Enterprises, Inc.*, 272 Conn. 627, 645 (2005), quoting *Nikitiuk v. Pishtey*, 153 Conn. 545, 552 (1966); see *Komondy v. Zoning Board of Appeals*, 127 Conn. App. 669, 678 (2011) ("[T]he burden rests with the applicant to demonstrate its entitlement to the requested relief."). The applicants have the burden of proof to show they are entitled to approval of their application.¹

C. Standard of Proof

The statutes governing Siting Council consideration of applications for a Certificate of Environmental Compatibility and Public Need are silent as to the standard of proof that the applicant must meet for the application to be granted. "In the absence of state legislation prescribing an applicable standard of proof. . . . the

¹ See *Citizens Guide to Siting Council Procedures for Cell Towers*, Connecticut Siting Council, p.2 ("The cell phone service provider has the burden of proving to the Council that the site selected is needed to provide cell phone service and that the construction and operation of a cell tower at the site would not result in a significant environmental impact. The role of the Council is to review the service provider's evidence of need for cell phone service in the selected area and evidence of environmental impact for the selected site.")

preponderance of the evidence standard is the appropriate standard of proof in administrative proceedings” *Goldstar Medical Services, Inc. v. Dept. of Social Services*, 288 Conn. 790, 821 (2008).

D. Due Process and Fundamental Fairness

The requirements of fundamental fairness and due process apply to Siting Council procedures. *Concerned Citizens of Sterling v. Connecticut Siting Council*, 215 Conn. 474, 484 (1990); *Rosa v. Connecticut Siting Council*, Superior Court, judicial District of New Britain, Docket No. HHB-CV-05-4007974-S (March 1, 2007), 2007 WL 829582, *Torrington v. Connecticut Siting Council*, Superior Court, judicial district of Hartford, Docket No. CV90-0371550-S (September 12, 1991), 1991 WL 188815.

In *Grimes v. Conservation Commission*, the Supreme Court defined the parameters of "fundamental fairness" in administrative proceedings:

Although no constitutional due process right exists in this case, we have recognized a common-law right to fundamental fairness in administrative hearings. "The only requirement [in administrative proceedings] is that the conduct of the hearing shall not violate the fundamentals of natural justice." *Miklus v. Zoning Board of Appeals*, 154 Conn. 399, 406, 225 A.2d 637 (1967). Fundamentals of natural justice require that "there must be due notice of the hearing, and at the hearing no one may be deprived of the right to produce relevant evidence or to cross-examine witnesses produced by his adversary." *Parsons v. Board of Zoning Appeals*, 140 Conn. 290, 293, 99 A.2d 149 (1953), overruled on other grounds, *Ward v. Zoning Board of Appeals*, 153 Conn. 141, 146- 47, 215 A.2d 104 (1965). Put differently, "[d]ue process of law requires that the parties involved have an opportunity to know the facts on which the commission is asked to act and to offer rebuttal evidence." *Pizzola v. Planning & Zoning Commission*, 167 Conn. 202, 207, 355 A.2d 21 (1974); see also *New England Rehabilitation Hospital of Hartford, Inc. v. Commission on Hospitals & Health Care*, 226 Conn. 105, 149-50, 627 A.2d 1257 (1993) (administrative agency "cannot properly base its decision upon [independent] reports without introducing them in evidence so as to afford interested parties an opportunity to meet them"); *Huck v. Inland Wetlands & Watercourses Agency*, 203 Conn. 525, 536, 525 A.2d 940 (1987) (administrative due process requires due notice and

right to produce relevant evidence); *Connecticut Fund for the Environment, Inc. v. Stamford*, 192 Conn. 247, 249, 470 A.2d 1214 (1984) (same). The purpose of administrative notice requirements is to allow parties to "prepare intelligently for the hearing." *Jarvis Acres, Inc. v. Zoning Commission*, supra, 163 Conn. [41] at 47, 301 A.2d 244 [(1972)].

(Footnotes omitted.) *Grimes v. Conservation Commission*, 243 Conn. 266, 273-4 (1997). The Siting Council is bound by these requirements in its consideration of this application.

The JMB parties renew the arguments made in their Motion to Dismiss/Motion for Stay of Proceedings date May 31, 2022, their Motion for Site Inspection dated June 14, 2022, their Motion to Compel dated June 27, 2022, their Motion in Limine dated June 27, 2022, and their Motion to Strike dated July 6, 2022, to which the Siting Council is respectfully referred.

II. PROPOSED FACTUAL FINDINGS

The proposed factual findings of the JMB parties are set forth in the appendix to this post-hearing brief, together with references to the evidence in the administrative record which supports them.

III. CLAIMS OF LAW

A. The Proposed Cell Tower Site

The subject of this proceeding is a proposed cell tower to be built on a 5-acre parcel of land at 1837 Ponus Ridge Road. Laurel Reservoir is located downgradient 70 feet from the proposed cell tower site. (Proposed factual finding ("PFF") 2, 10) The property is densely forested, with areas of ledge, stones and boulders visible on the surface. (PFF 11, 16, 17) Ponus Ridge Road runs along the westerly boundary of the property. Steep slopes drop 70-80 vertical feet to a brook and associated wetlands

along the northerly boundary of the property, and down to Ponus Ridge Road on the west, both of which drain to Laurel Reservoir.² (PFF 11, 33, 34)

There is a residence at the southerly end of 1837 Ponus Ridge Road and further residential development on this parcel would be prohibited by the New Canaan Zoning Regulations. (PFF 7-9) The proposed tower compound would be placed in a wooded area in the northeast part of the parcel and would consist of a 70 ft. x 85 ft lease area containing four propane-powered generators with four 500-gallon propane tanks, a walk-in cabinet on a concrete pad, an ice bridge, and a 115 ft. high “monopine” tower, all of which will be surrounded by a chain link fence.³

Access to the proposed cell tower compound would be from Ponus Ridge Road following an existing paved driveway that serves the residence on the property and then along a proposed 12-foot-wide driveway at grades of 19.4 percent and 8.9 percent for approximately 460 feet. (PFF 8, 54) Underground utilities would be trenched along the

² The applicants’ site plans, which show the design of the proposed cell tower facility and include critical measurements of its distance from property boundaries, adjacent residences, the wetland corridor and watercourse, and Laurel Reservoir, were drawn using the “Site Survey” on Sheet EX-1 as the base map. (PFF 3) This is problematic because the bearings and distances of the proposed cell tower site on the “Site Survey” do not match the bearings and distances of the proposed cell tower site in the deed of acquisition or on the survey of record. (PFF 4) These discrepancies are of more than academic interest, because they result in three ambiguities (the location of the northeasterly street line of Ponus Ridge Road, the location of the northerly street line of Dan’s Highway, and the location of the northerly boundary of the subject parcel), and involve discrepancies of 5.81 feet (at the northerly street line of Dan’s Highway) and 6 feet (along the northerly boundary of the subject parcel). (PFF 4)

These issues were never resolved, because the applicants’ surveyor was not made available for cross-examination (PFF 6), and the applicants’ explanation of the discrepancies (in “Applicants’ Responses to Buschmann Interrogatories, 06/21/22,” Response A3) misstates one of the courses in the deed and survey of record (as “S74°50’00”W, 18.00” instead of “S74°50’00”W, 13.00’,” at the northerly street line of Dan’s Highway) and ignores a second discrepancy (the “Site Survey” shows “N57°59’00”E, 47.75” along the northerly property boundary instead of “N57°59’00”E, 41.75” as shown in the deed and on the survey of record). As we shall see, this is just one of many examples of the applicants’ cavalier approach in responding to questions which arose during the public hearing process.

³ The applicants apparently intend to proceed with the proposed cell tower as shown on the site plans included in the “Applicants’ Supplemental Submission, 08/31/22.” (PFF 1)

shoulder of the proposed access drive. The slopes from the access drive down to the wetland corridor and Ponus Ridge Road approximate 50 percent. (PFF 55, 104)

The applicants propose to clear an area approximately 37,000 sq. ft. They would remove 103 trees greater than 6” in diameter at breast height in order to construct the compound and access drive, 32 of which are greater than 14” in diameter at breast height. Site construction will require significant cuts and fills. (PFF 64, 91) The onsite soils are characterized as “Charlton and Chatfield, extremely rocky,” and are highly erodible. (PFF 14, 15) State and Federal listed species have been reported in the vicinity of the proposed site. (PFF 12-15, 91, 112, 120-123)

Ponus Ridge Road runs along the easterly shore of Laurel Reservoir. The proposed cell tower will be visible year-round from Laurel Reservoir, the shore of Laurel Reservoir, and the surrounding area. (PFF 21) The lands along the shore of the Reservoir are owned by the Aquarion Water Company or the State of Connecticut and comprise part of the Centennial Watershed State Forest. (PFF 20) The site of the proposed cell tower is a relatively undisturbed area possessing significant scenic qualities due to its proximity to Laurel Reservoir and the Centennial Watershed State Forest.

B. Applicable Law

C.G.S § 16-50p contains the criteria that the Siting Council must follow in deciding an application in a certification proceeding: (1) whether the applicant has established a public need for the facility; and (2) whether the applicant has identified all adverse environmental impacts and conflicts with state policy and established that they are not sufficient to deny the application.

Section 22a-19 of the Connecticut Environmental Protection Act, C.G.S. §§ 22a-14 et seq., imposes certain additional requirements which are discussed below.

1. C.G.S. § 16-50p

C.G.S. § 16-50p (a) (3) sets forth the standards which the Siting Council must consider in determining whether to issue a certificate for the proposed cell tower. The Siting Council may not issue a certificate:

either as proposed or as modified by the Council, unless it shall find and determine: (A) ... a public need for the facility and the basis for the need, (B) the nature of the probable environmental impact of the facility ... including a specification of every significant adverse effect, including, but not limited to (ii) ecological balance, (iii) public health and safety, (iv) scenic, historic and recreational values ... (vi) forest and parks, (vii) air and water purity, and (viii) fish, aquaculture and wildlife [and] (C) why the adverse effects or conflicts referred to in subparagraph (3) of this subdivision are not sufficient reason to deny the application

C.G.S. § 16-50p (a) (3) (A) through (C).⁴

In addition to these factors, C.G.S. § 16-50p (b) (1) (C) requires the Siting Council, in every application for a proposed cell tower, to examine, among other things, "whether the proposed facility would be located in an area of the state which the council, in consultation with the Department of Energy and Environmental Protection and any affected municipalities, finds to be a relatively undisturbed area that possesses scenic quality of local, regional or state-wide significance." The Siting Council may deny an application if "the proposed facility would substantially

⁴ See *Connecticut Siting Council Rules of Practice*, Article 1, Part 1 ("Pursuant to C.G.S. §16-50j-1 of The Public Utility Environmental Standards Act (PUESA), the Council is charged with: (1) balancing the need for adequate and reliable public utility services at the lowest reasonable cost to consumers with the need to protect the environment and ecology of the state and to minimize damage to scenic, historic, and recreational values;.... (3) encouraging research to develop new and improved methods of...transmitting and receiving... telecommunications signals with minimal damage to the environment.")

affect the scenic quality of its location or surrounding neighborhood and no public safety concerns require that the proposed facility be constructed in such a location."

C.G.S. § 16-50p (b) (1).

2. C.G.S. § 22a-19

Mr. Buschmann's intervention into the proceedings under C.G.S. § 22a-19 imposes certain additional responsibilities on the Siting Council. The statute first requires that the Siting Council determine whether the proposed cell tower facility "does or is reasonably likely to unreasonably pollute, impair or destroy the public trust in the air, water or natural resources of the state." C.G.S. § 22a-19 (b). If the Siting Council finds that Mr. Buschmann has made a *prima facie* case of such impairment, the Siting Council must then determine if, "considering all relevant surrounding circumstances and factors, there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare." C.G.S. § 22a-19; see *City of Waterbury v. Town of Washington*, 260 Conn. 506, 549- 51 (2002).

C. The Proposed Tower Would Significantly Affect a Scenic Area of Statewide Significance and No Public Safety Concerns Are Implicated

The proposed cell tower would be visible year-round from Laurel Reservoir and from essentially all of the shore of Laurel Reservoir. (PFF 21) The lands encircling Laurel Reservoir are owned by the Aquarion Water Company and the Connecticut Department of Energy and Environmental Protection and comprise part of the Centennial Watershed State Forest. (PFF 20)

The proposed cell tower would thus be visible year-round from that portion of Centennial Watershed State Forest which includes Laurel Reservoir and the shore of Laurel Reservoir. (PFF 22) The *Natural Resources Management Agreement* which established the Centennial Watershed State Forest, § 5.4, provides that “[p]ublic use and recreation opportunities [of Centennial Watershed State Forest lands] will be encouraged” under appropriate circumstances. Areas of the Centennial Watershed State Forest are currently open to public use, and it may be anticipated that public use will expand in the future. (PFF 23, 24)

The statewide *Conservation and Development Policies Plan (2018-2023)*, which sets forth planning goals and objectives for the State of Connecticut, identifies the proposed cell tower site as located within a Conservation Area. The definitional criteria for this designation state that it is Connecticut's policy for such Conservation Areas to "plan and manage, for the long-term public benefit, the lands contributing to the State's need for food, fiber, water and other resources, open space, recreation and environmental quality and ensure that changes in use are compatible with identified conservation values." According to the Office of Policy and Management, "Conservation Areas are delineated based on the presence of factors that reflect environmental or natural resource values. In contrast to Priority Funding Areas, which are based on man-made Census Blocks, Conservation Areas are based on existing environmental conditions, such as soils or elevation, which oftentimes have no visible boundaries. Any growth-related project being considered by a state agency in Conservation Areas would require an exception in accordance with CGS Section 16a-35d, including a review of

consistency with the affected municipality's plan of conservation and development."
(PFF 29)

The *2014 Plan of Conservation and Development of the Town of New Canaan* shows the proposed cell tower site within a scenic area on the "Scenic Resources" Map and within the "New Canaan/Stamford Greenway" on the "Open Space" Map. (PFF 19)

The application also fails to conform to the requirements of the New Canaan Zoning Regulations, which expressly encourage utilization of "the least obtrusive means of having [telecommunications] services available" in New Canaan. The applicants have proposed to construct a least favored communications facility (a monopine), to site it in a location that will have adverse visual impacts on scenic resources identified in the *2014 Plan of Conservation and Development*, and they refuse to conceal the equipment shelter in a building which resembles a shed or other residential accessory structure. (PFF 25-27) Further, the applicants propose to install the so-called "monopine" tower on a property devoid of conifers. (PFF 28)

The proposed cell tower at 1837 Ponus Ridge Road would be clearly visible from Laurel Reservoir, a pristine waterbody of statewide significance, and the surrounding shoreline within the Centennial Watershed State Forest.

There are no countervailing public safety concerns which require that the proposed cell tower be constructed at 1837 Ponus Ridge Road. First of all, the "First Responder" records of the Town of New Canaan make no reference to instances "where lack of cell [phone] service in emergency situations was a public safety problem." (PFF 150) Moreover, New Canaan's public safety communication needs are well satisfied by existing infrastructure. The Town currently has public safety radio

antennas at 982 Oenoke Ridge Road, which, in combination with a second Town-owned public safety radio antenna at West Elementary School, satisfies public safety requirements for the area to be served by the proposed cell tower. (PFF 143) In a letter written on January 13, 2022, just three months before this application was filed, a senior engineer of the Town of New Canaan wrote that as a result of the antennas at these two locations, “[e]mergency services personnel are able to communicate, using their portable radios, with dispatch, in the northwest area of Town.” (PFF 144) The license agreement controlling Town of New Canaan access to 982 Oenoke Ridge Road for the installation and maintenance of public safety radio antennas commenced on April 1, 2018, expires on March 31, 2024, and thereafter automatically renews for one-year periods unless the property owner elects to terminate the license agreement. (PFF 145) Public safety concerns do not justify the erection of a cell tower at 1837 Ponus Ridge Road.⁵

D. Potential Adverse Environmental Impacts Outweigh the Public Need

In addition to neglecting the visual impacts of the proposed cell tower facility, the applicants failed to identify all adverse environmental impacts and conflicts with State policy and demonstrate that they are not sufficient to deny the application.

The desk-top analyses that accompany this application are inadequate to allow the Siting Council to reach the threshold conclusion of environmental compatibility. The applicants undertook no field investigation or study of site geology, hydrology, wildlife

⁵ Although there was testimony in favor of the site by the New Canaan First Selectman and EMT officials at the public session of the public hearing which took place on June 28, 2022, their testimony was not subject to cross examination. The letters submitted by the EMT officials were, in fact, drafted by the applicants. (NCN Administrative Notice Item 60 (aa))

inventory, habitat and utilization, wetlands and watercourse functions and values, or analysis of potential short- and long-term environmental impacts of the construction and operation of the proposed cell tower. (PFF 108, 115) The only field work that the applicants conducted was a partial delineation of the wetlands on the property and the preparation of a table generically identifying some of the trees on the property, and the individuals who conducted this field work were not even present at the public hearing.⁶ (PFF 106-107, 130-132) The assessment of the potential for environmental harm or compatibility requires detailed analyses of the resources at a proposed site by field investigation. Such investigation should be conducted by individuals with the necessary education, training and experience to assess and analyze the physical characteristics of the site and its biological and other natural resources.⁷ Without this critical information, the Siting Council cannot make an informed decision about the potential adverse environmental impacts likely to result from the construction and operation of the tower as proposed. (PFF 117) Without such investigations, the applicants' statements that "the proposed Facility will have little to no impact on water flow or water quality," and that "[n]o direct impacts to any wetlands or watercourses are anticipated," are meaningless, because they lack any scientific foundation.

⁶ The "Connecticut Siting Council Information Guide to Party and Intervenor Status" requires that all individuals responsible for the preparation of application materials be made available for cross examination at the public hearing on the application. ("For example, if a party or intervenor presents a land survey in their pre-filed testimony, the author or engineer that prepared the land survey must be present at the hearing, sworn in and available to answer questions pertaining to the land survey that are asked by the Council and the other participants in the proceeding.") (Connecticut Siting Council Information Guide to Party and Intervenor Status, p.2)

⁷ See the discussion in Klemens. M. W., H. J. Gruner, D. P. Quinn, and E. R. Davison, *Conservation of Amphibians and Reptiles in Connecticut*, Revision to Bulletin 112, DEEP 2021, pp. 254-55 (JMB Administrative Notice Item 30)

What follows below summarizes the record evidence of the most significant environmental challenges and concerns implicated in this application. The primary source of this evidence is the intervening parties and other stakeholders, rather than the applicants, who chose either to ignore issues concerning probable environmental impacts or deflect them to the Council's consideration of the Development and Management Plan for the proposed tower following a presumed approval, where they would be insulated from public scrutiny and comment.

1. Soil Erosion and Sedimentation

According to the *Connecticut Guidelines for Soil Erosion and Sediment Control*, soil characteristics, vegetative cover, topography and climate are the principal determinants of the erosion potential for any area. (PFF 30)

The soils at the proposed cell tower site are rocky, highly erodible and shallow to bedrock. (PFF 12-17, 43) Onsite soils are characterized as "Charlton and Chatfield, extremely rocky," and are included among the "Highly Erodible Soil Map Units for Fairfield County" by the Natural Resource Conservation Service. (PFF 12-15) When conducting their archaeological survey assessment of the proposed cell tower site, the applicants' consultants planned to perform 12 shovel tests to a depth of 19.3 inches, but 9 of the 12 planned shovel tests could not be completed because the consultants encountered large immovable rocks. (PFF 16) Exposed ledge outcroppings and rock are visible throughout the site. (PFF 17)

Extensive clearing would be required in the construction of the cell tower facility and no post-construction plantings have been proposed. The total area to be disturbed by is 37,000 sq. ft., or more than 4/5 of an acre. (PFF 64, 103) More than 103 trees

greater than six inches in diameter will be removed from the site. (PFF 91, 129) The applicants have submitted no planting plan to be implemented following construction in order to stabilize and revegetate the site, noting only that the disturbed areas would be revegetated with so-called “builder’s mix” (white clover, tall fescue and ryegrass.) (PFF 48-49) The site work would require 3,550 cubic yds. of excavation and 1,500 cubic yds. of fill. The proposed tower compound and access drive would require an additional 250 cubic yards of fill (PFF 64-65)

The proposed tower and access road would be perched on steep slopes leading down to a wetlands and watercourse and Ponus Ridge Road, which drain directly into Laurel Reservoir. (PFF 33-35, 109) The *2014 Plan of Conservation and Development of the Town of New Canaan* shows the proposed cell tower site located within an area designated as “Slopes greater than 25 %” on the Natural Resources Map. (PFF 19) The side slopes leading from the north side of the access driveway to the inland wetlands and watercourse are 2:1, or 50 percent. (PFF 104) The side slopes leading from the stilling basins on the west side of the access driveway to Ponus Ridge Road are also 2:1, or 50 percent. (PFF 53)

The proposed access driveway would have a 250 ft. paved section with a 19.40 percent slope and a 210 ft. gravel section with an 8.9 percent slope. (PFF 54) Construction of the driveway would require a 50-ft. high cut and the resulting slopes on either side of the driveway would be 2:1, or 50 percent. (PFF 55) Driveway slopes greater than 12-15% are considered excessive by generally accepted design standards

and are difficult to construct and potentially dangerous to navigate.⁸ (PFF 58) They also present significant challenges in erosion and sedimentation control, both pre- and post-construction.

The application takes no account of the increasing risks brought on by climate change. Climate change results in more frequent intense rainstorms which will overwhelm the stormwater management train on this site, elevating the risk of catastrophic failures. (PFF 44) Under current conditions, there is a significant potential for erosion and sedimentation from any construction project to impact down-gradient water resources as a result of climate change, and this risk is documented in the public hearing record.⁹

These four factors indicate that erosion poses a significant risk at this site. Stormwater, after construction is complete, would flow down the hill unchecked towards the wetland corridor and watercourse to the north and down the hill from the stilling basins on the westerly side of the access road to Ponus Ridge Road on 2:1 slopes. (PFF 33-35) According to the *Guidelines for Upland Review Area Regulations*

⁸ Although the applicants state that “[m]aintenance of the facility during the winter months shall not include the application of salt or similar products for melting snow or ice (Applicants' Supplemental Submission, 08/31/22, Sheet N-2), as a practical matter, the access road to the proposed cell tower compound would have to be treated with a de-icing compound in order to make it passable in winter. (PFF 57) Homeland indicated that it “does not regularly plow access drives to their sites since these sites are visited so infrequently. Should a tenant on the tower need access to the tower, they will coordinate plowing/clearing.” (PFF 56) Query whether snowplowing contractors would be made aware of the purported restriction on the use of de-icing compounds if the tower were built.

⁹ The Siting Council has experienced catastrophic stormwater failures at some of its recently approved sites (e.g., Petition 1056 East Lyme, Petition 1178 Sprague). (PFF 46) Failures can also result from mismanagement. At the Sprague solar site, Connecticut Siting Council Petition No. 1178, for example, where the applicants' consultant All Point Technologies served as both the design consultants and the so-called “third-party monitors,” there were significant discharges of stormwater-transported sediment onto adjacent properties, into several intermittent watercourses, into two farm ponds and into the Little River which occurred during only 1- to 2-inch storm events. Additionally, an oil sheen was observed in stormwater discharges and construction equipment was observed leaking oil. (PFF 47)

promulgated by the Department of Energy and Environmental Protection, “In general, the greater the slope of the land being developed, the greater the potential threat of damage to adjacent wetlands and watercourses from erosion and sedimentation.” (PFF 110)

The site plans for the proposed cell tower facility do little to allay concerns over the high potential for erosion at this site. The applicants’ engineer testified at the public hearing that the drainage design for the proposed cell tower facility would achieve zero increase in volume of storm water runoff from the property in addition to matching peak flows from the property. (PFF 38) However, limitation of the volume of stormwater running off the property following construction requires that provision for infiltration be incorporated into the drainage design. (PFF 39) According to the Drinking Water Section of the Department of Public Health, “[t]he proposed access road will increase the amount of impermeability on the parcel and will increase the risk of runoff. Measures should be taken to increase infiltration near the road, such as a rain garden.” (PFF 40)

As presently designed, the site plans make no provision for the infiltration of stormwater. (PFF 41) The swales proposed by the applicants along the easterly side of the access road “are designed as riprap swales, so they’re rock with a smaller stone check dam so they’re not grass swales.” (PFF 42) Similarly, the stilling basins proposed by the applicants along the westerly side of the access road are rock, because the applicants are unsure if the onsite soils are suitable for infiltration. (PFF 42) Because of the nature of the soils, the minimal overburden, and the exposed ledge and shallow bedrock conditions at the site, infiltration will be difficult or impossible to accomplish. (PFF 43) The applicants did not submit a geotechnical study as part of their application

materials. A geotechnical study would indicate the precise nature and depth of the soils underlying the site and the permeability of those soils. Without such a study the applicants cannot demonstrate that infiltration is possible at this site. (PFF 50-52)

The applicants also failed to submit a drainage study as part of their application materials. According to their engineer, the drainage system for the proposed cell tower site has been sized for a ten-year/24-hour storm based on undisclosed “comps.”¹⁰ (PFF 37) The “*Drainage Certification Policy of the Town of New Canaan*” requires the submission of “[c]omplete drainage information and/or calculations for pre-activity (pre-development) and post-activity (post-development) stormwater runoff from a site,” and that “[p]eak flow rates and runoff volumes shall be determined using the Rational Method, the Time of Concentration Method, the Tabular Method or the Unit Hydrograph Method and a minimum 25-year 24-hour design storm.” (PFF 36) Although not binding on the Siting Council, the *Policy* is representative of typical municipal requirements. The applicants submitted no drainage calculations meeting these requirements demonstrating that the proposed drainage design would be adequate given the poor soils, extensive clearing and steep slopes.

The drainage system of Ponus Ridge Road relies primarily on sheet runoff to both edges of the roadway. On the southerly side of the roadway, that sheet runoff is currently directed to Laurel Reservoir. (PFF 33) Aquarion’s Natural Resources Manager warned the Siting Council that “[u]ndeveloped land offers the greatest level of protection

¹⁰ This testimony seems to be inconsistent with the applicants’ engineer’s statement that he has not examined the culvert which originates at the northwest corner of the proposed cell tower site and crosses Ponus Ridge Road and has no knowledge of its condition or where drainage entering the culvert outfalls. (PFF 31)

to drinking water reservoir quality. While the applicant seems to acknowledge the sensitivity of this site with multiple stormwater management controls shown in the plans, the removal of vegetation and alterations to the site will degrade stormwater quality which will impact reservoir water quality.” (PFF 61) The Council on Environmental Quality also expressed concerns about stormwater management on the proposed site and the potential impact of increased stormwater on wetland resources, water quality, and native vegetation and soils. (PFF 62)

The Drinking Water Section of the Department of Public Health commented, “[f]orests are ideal for enhancing drinking water source quality by maximizing contaminant filtration and minimizing runoff and mobilization of potential contaminants. According to the proposal, 106 trees will be removed.¹¹ Due to the close proximity of this parcel to the drinking water reservoir and the existing slope on this and adjacent land, runoff is a significant concern to drinking water source quality.” (PFF 91) They also cautioned about the use of fill at the site: “65 yards of fill is proposed to be brought onsite as part of this proposal. It is imperative that the source of the fill is known and that it is verified that no legacy contamination is contained within the fill. In numerous instances in Connecticut, the use of contaminated fill has impacted water quality. Also, with a large quantity of fill, erosion is a concern before a vegetative cover is established.” (PFF 92)

It may well be necessary to bring additional fill to the site. The applicant assumes that the 1,500 cubic yards of fill that would be required to construct the proposed cell

¹¹ The site plan was revised slightly after this comment was made. According to the Applicants' Supplemental Submission, 08/31/22, Sheet SP-2, the applicants propose to remove 103 trees which are 6” or greater in diameter at breast height.

tower facility will come from the excavation activities in the construction of the site, but whether the excavated fill will be suitable cannot be determined until the material itself is tested. (PFF 64-65) Absent a geotechnical study, this will not be known until the commencement of construction.

2. The Potential for Acid Rock Drainage

In addition to the steep slopes and poor soils at the proposed cell tower site, the presence of shallow bedrock presents another host of concerns beyond simply increasing the likelihood of sedimentation and erosion.

Acid rock drainage does not solely result from blasting, it can occur anytime bedrock is exposed. (PFF 70) Exposed ledge outcroppings and rock are visible throughout the proposed cell tower site. (PFF 17) As noted above, the site work required for the proposed cell tower entails 3,550 cubic yds. of excavation and 1,500 cubic yds. of fill over a 37,000 sq. ft. area of disturbance. (PFF 64-65) It is inevitable that rock will be encountered during construction. (PFF 66)

According to David S. Ziaks, P.E., who reviewed the site plans for the proposed cell tower, “[i]n all likelihood, blasting and considerable rock excavation will be required given the extensive 50 ft. high slope cut that will be required to construct the access driveway and tower pad site.” Once removed from the ground, the applicants have indicated that they may elect to crush the excavated rock at the site with a rock crusher. (PFF 69)

The applicants’ consultants acknowledged the potential need for blasting in the construction of the proposed cell tower facility. (PFF 67) A geotechnical study would be required in order to determine the depth to bedrock and the location of soils shallow to

bedrock on the site. (PFF 73) Although the applicants stated that “[t]he geotechnical investigation to be performed at the site [would also] include an evaluation of the underlying bedrock in terms of its potential to cause ARD [acid rock drainage],” they offered no data at the public hearing which would have allowed the Siting Council to measure that risk, and their wetlands scientist was admittedly beyond his ken when questioned about it. (See Transcript, 9/8/22, Gustafson Cross, pp. 41-43)

The *State of Connecticut Department of Energy and Environmental Protection Guidance Document for Evaluating Potential Hydrogeologic Impacts Associated with Blasting & Development* states that “[w]here significant earth removal and/or blasting activities are likely to occur. . . . there is concern for possible negative impacts to the quality and quantity of water in neighboring drinking water wells, as well as other environmental factors such as erosion, sedimentation, and decreased surface water quality conditions.” (PFF 75) The *Guidance Document* continues, “[o]ne of the primary concerns [where significant earth removal and/or blasting activities occur] is acid rock drainage (ARD), which is a natural process, but can be exacerbated when rock is crushed and used for fill or other purposes that expose the freshly crushed rock to precipitation. ARD is caused by the presence of bedrock containing high levels of iron sulfide (which is present in Eastern and Western Highlands and sometimes the central valley of CT), especially such rock that is freshly exposed or crushed and has been subjected to the elements/precipitation.” (PFF 71, 72) Under these conditions, there is an elevated risk for mobilizing naturally-occurring iron, manganese, and sulfur, which may adversely affect groundwater and drinking water quality. (PFF 72) The evidence that the applicants have proffered does nothing to dispel this risk.

3. Impacts to Laurel Reservoir

The overriding environmental concern presented by proposed tower facility is its potential to adversely impact a public water supply serving 120,000 households in Fairfield County. (PFF 82) In evaluating the risk of adverse environmental impact, it is necessary to consider the value and sensitivity of the receiving resource: the more valuable and sensitive the resource, the greater the precautions which are warranted. (PFF 63)

The Connecticut General Statutes establish that the protection of public water supply watershed lands is a primary goal and policy of the State, and that public water supplies must be protected wherever possible. (C.G.S. §§ 25-37a and 22a-380) (PFF 78). The *2020-2030 Regional Plan of Conservation and Development* of the Western Connecticut Council of Governments includes the proposed site within an “Aquifer Protection Area,” and provides: “Both existing and potential [water] supply sources should be given equal weight for protection on the Future Growth Map, as Conservation Areas.” (PFF 79). As noted above, the *2014 Plan of Conservation and Development of the Town of New Canaan* shows the proposed cell tower site located within a “Public Water Supply Watershed,” on the “Natural Resources Map” (PFF 80)

The Drinking Water Section of the Department of Public Health advised the Siting Council that “[t]his project is contained within the public water supply watershed of Laurel Reservoir, an active source of public drinking water for Aquarion Water Company,” (PFF 81) and that the application warranted special attention. Laurel Reservoir itself is located 70 feet away and downgradient from the proposed cell tower

site. (PFF 10) The reservoir is included in the Commissioner of Public Health's High Quality Source List. (PFF 83)

The site of the proposed tower was formerly owned by the Stamford Water Company, which sold the property immediately prior to the enactment of C.G.S. § 25-32.¹² (PFF 84) Under C.G.S. § 25-37c, all land owned by a water company falls into three classes. Class I includes watershed land nearest to water supply sources, (e.g., within 250 feet of a reservoir, 200 feet of a well, or 100 feet of a watercourse). It also includes certain environmentally sensitive lands, such as those that are steeply sloped or where bedrock is less than 20 inches from the soil surface. Class II land is (1) on the public drinking supply watershed but not included in class I and (2) completely off the watershed but within 150 feet of a reservoir or a major stream that runs into it. Class III consists of the rest of the company's land. (PFF 85) If the proposed cell tower site were still owned by the Stamford Water Company, it would be classified as Class I and Class II watershed land. (PFF 87)

The proximity to Laurel Reservoir makes this site particularly unsuitable as the location for the proposed cell tower. The applicants conducted no investigation or analysis of potential adverse impacts on the reservoir or its watershed. According to the Drinking Water Section of the Department of Public Health, the application for the proposed cell tower contains “little to no analysis of the potential impacts this installation could have upon the active Laurel Reservoir.”¹³ (PFF 90)

¹² C.G.S. § 25-32 requires a Department of Public Health certificate to sell, transfer, or change the use of watershed land owned by a water company. Water companies are prohibited from selling or leasing Class I or II watershed land to a telecommunication company or other tower developer. (PFF 86)

¹³ This lack of information did not escape the notice of Robert Mercier, the analyst assigned to the application. See Transcript, 9/8/22, Gustafson Cross, pp. 41-44.

The Aquarion Water Company, which is responsible for maintaining the integrity of the reservoir and its adjacent land under the *Natural Resources Management Agreement*¹⁴ which governs the management of the reservoir, opposes the approval of this application. Aquarion warns that “[a]ny activity from the development of [the proposed site] or land uses that occur *will negatively impact water quality of the nearby wetlands, watercourse, and drainage which enters the public drinking water supply reservoir*. The removal of over 100 trees which make up a protective tree canopy and cut and fill activities on steep slopes to create a 500+- foot driveway to access the structure both *will negatively impact the function of this watershed area*. Careful consideration should be given by the council to determine if this is the best location and appropriate use given the proximity to the public water supply and negative impacts to water quality.” (Emphasis added.) (PFF 93)

The scant information provided by the applicants fails to establish that construction and operation of the proposed cell tower at 1837 Ponus Ridge Road can be accomplished without the likelihood of erosion and sedimentation problems, and pollution from acid rock drainage, de-icing compounds, pesticides and herbicides entering Laurel Reservoir.¹⁵

4. **Impacts to On-Site Inland Wetlands and Watercourse**

An intermittent stream and associated wetland corridor run along the northerly boundary of the proposed cell tower site. (PFF 98) The intermittent stream forming the

¹⁴ PFF 23; see JMB Administrative Notice Item 25.

¹⁵ The applicants have indicated that pesticides and herbicides may be used (PFF 89), and there was testimony that due to the steep grades, the proposed access road to the cell tower compound would have to be treated with a de-icing compound in the winter. (PFF 57) All runoff from the proposed cell tower site drains into Laurel Reservoir. (PFF 33-35)

northerly boundary of the proposed cell tower site is a “Class 1 Stream” per the Connecticut Department of Energy and Environmental Protection. (PFF 99) The Department of Energy and Environmental Protection has also designated the stream a “First-Order Stream Tributary,” which is “a stream which directly enters a reservoir.” (PFF 100)

The applicants incorrectly state that construction of the proposed cell tower facility “would not constitute a regulated activity under the Local Wetlands Regulations.” (Application Narrative, p. 26/28) There are more than 5,000 square feet of inland wetlands located on the proposed cell tower site. (PFF 102) The limit of disturbance for construction of the access road is 107 feet and upgradient from the wetlands boundary. (PFF 98, 104) Construction of the proposed facility would therefore constitute a “regulated activity” under the New Canaan Inland Wetlands and Watercourses Regulations, because the total disturbed area is more than one half acre and upgradient from a wetland larger than 5000 square feet. (PFF 105) Municipal inland wetlands and watercourses regulations do not bind the Siting Council, but the New Canaan regulations reflect the local agency’s heightened concerns about construction on steep slopes draining to a wetlands and watercourse.¹⁶ The applicants did little to address these concerns, other than assuring the Siting Council that appropriate sedimentation and erosion controls would be implemented during construction.

¹⁶ Further, the onsite soils are highly erodible. (PFF 112) The Connecticut Department of Environmental Protection, Wetlands Management Section, Bureau of Water Management, *Guidelines Upland Review Area Connecticut’s Inland Wetlands and Watercourses Act* observe that “[c]ombined with slope, the type of soil found adjacent to wetlands and watercourses is an important factor in how development may affect adjacent wetlands or watercourses.” (PFF 111)

The applicants offered only a skeleton report on the onsite wetlands, with no discussion of their nature and characteristics and no analysis of probable impacts. Only some of the onsite wetlands were flagged by the applicants' soil scientist, Matt Gustafson, and the applicants did not make him available for cross-examination. (PFF 106, 107) No assessment of wetlands functions and values was performed for the onsite wetlands and watercourse. (108) No wetlands soils report was provided, and no evaluation of the on-site inland wetlands and watercourse has been done.

Following construction, untreated stormwater runoff from the proposed access drive would run into the wetlands and watercourse along the northerly boundary of the property before draining into Laurel Reservoir. The applicants' engineer could not testify to the Siting Council whether the proposed facility as depicted on the site plans included with the application would have an adverse effect on the onsite inland wetlands or water quality of Laurel Reservoir.¹⁷ (PFF 113) Without such assurance, supported by the

¹⁷ The applicants' engineer testified that he *would* design a plan with no adverse impacts after a presumed approval, and after obtaining critical additional information, but conceded that he could not testify that the plan currently pending before the Siting Council would have no adverse impacts:

MR. SHERWOOD: So you can't testify today whether the construction of the tower will negatively impact the wetlands or the reservoir?

THE WITNESS (Burns): No. I'm telling you I'm going to design it so it doesn't.

MR. SHERWOOD: But as we see it today on SP-2 revised to 7/7/'22 --

THE WITNESS (Burns): My design on SP-2, yes.

MR. SHERWOOD: Your testimony is that that will not negatively impact water quality in the wetland, watercourse or in the reservoir --

THE WITNESS (Burns): I'm saying that --

MR. SHERWOOD: Even without the geotechnical study?

THE WITNESS (Burns): No, I'm saying without a D and M plan, a set of CDs, a geotechnical investigation, a tower foundation design, a tower design, none of this site can be built at the point. So you're asking me make an assumption based on plans that are not (unintelligible) --

MR. SHERWOOD: My question isn't whether it can be built. My question is whether you can testify to the Siting Council --

necessary objectively verifiable and replicable data and analysis, the Siting Council should not approve this application.

5. **Effects on Plants and Wildlife**

The applicants performed no site-specific surveys or investigations of plant and wildlife species found at or near the proposed cell tower site in connection with this application. (PFF 115) The assessment of the potential for adverse effects on plants and wildlife requires detailed analyses of these resources by field investigation. (PFF 117) Such investigation should be conducted by qualified individuals with the training and experience to assess the range of species present on a site, and to evaluate the potential for the occurrence of other species where suitable habitat is present and the site falls within the expected bio-geographic range.

Northwest New Canaan is an area of the State of Connecticut with great ecological integrity. (PFF 114) The proposed cell tower site is located within a "Natural Diversity Database Area," on the Natural Resources Map in the *2014 Plan of Conservation and Development of the Town of New Canaan*. (PFF 119) The Connecticut Department of Environmental Protection Natural Diversity Database indicates that three State-listed species may be affected by activities associated with the proposed facility: Little Brown Bat (*Myotis lucifugus*)- State Endangered; Red Bat

THE WITNESS (Burns): No, I cannot.

MR. SHERWOOD: Whether it will have an adverse impact --

THE WITNESS (Burns): No.

MR. SHERWOOD: -- on the water quality of the reservoir or wetland?

MS. CHIOCCHIO: Mister Silvestri, I think we need to --

MR. SHERWOOD: (Unintelligible.)

(Transcript, 7/14/22, Burns Cross, pp. 104-105)

(*Lasiurus borealis*)- State Special Concern; and Eastern Box Turtle (*Terrapene carolina carolina*)- State Special Concern. (PFF 121) Two Federally listed threatened species, the Northern Long-eared Bat (*Myotis septentrionalis*) and Bog Turtle (*Clemmys (Glyptemys) muhlenbergii*), are found within the project area. (PFF 122) According to *Conservation of Amphibians and Reptiles in Connecticut* (Klemens et al. 2021), the following additional listed species have been documented in the vicinity of the site: Spotted Turtle (*Clemmys guttata*, p. 123) – State Special Concern, Wood Turtle (*Glyptemys insculpta*, p. 125) – State Special Concern, and Black Racer (*Coluber constrictor*, which is a GCN (Greatest Conservation Need) “important species,” p. 142). (PFF 123) Although the applicants made some provision for the protection of the three State-listed species and the Federally threatened Long-eared Bat, the effects of the construction and operation of the proposed cell tower on the other four listed species documented in the area were not addressed.

The proposed cell tower would be located in a mature upland hardwood forest dominated by an overstory of red, white, and black oak and sugar maples. (PFF 125) As noted above, the applicants’ “final” site plan shows the proposed removal of 103 trees which are 6 inches or more in diameter. (PFF 129) The applicants’ “Tree Survey Table” does not include all trees found on the site, identifies trees only by their generic name, and fails to provide any identification at all for 24 of the trees. (PFF 130) It is important to identify the species of tree, and not just to provide a common name, because the bark of certain trees, such as sugar maples, provide excellent bat roosting habitat, in

contrast to the smooth barked Norway maple. Likewise, certain oak species are especially good candidates to serve as bat roosting areas. (PFF 131).¹⁸

C.G.S. § 26-303 declares that the policy of the State is to protect endangered species.¹⁹ Each state agency is specifically directed to protect endangered wildlife under C.G.S. § 16-310.²⁰ No field studies or on-the-ground inventory of flora or fauna has ever been conducted on or around the proposed cell tower site.²¹ To require such an inventory and environmental impact study, in the face of a proposal such as the one

¹⁸ The applicants' tree protection detail differs from that recommended by the *Connecticut Guidelines for Soil Erosion and Sediment Control*, DEP Bulletin 34, which recommends a significantly greater area of protection. (PFF 133) It should also be noted that the applicants erred repeatedly in estimating the number of trees which would be affected by the clearing necessary to construct the proposed cell tower facility, to the point where little credence should be afforded their "final" estimate of 103 trees. See Transcript, 7/14/22, Burns Cross, pp. 76.

¹⁹ C.G.S. Sec. 26-303 provides: "Findings. Policy. The General Assembly finds that certain species of wildlife and plants have been rendered extinct as a consequence of man's activities and that other species of wildlife and plants are in danger of or threatened with extinction or have been otherwise reduced or may become extinct or reduced because of destruction, modification or severe curtailment of their habitats, exploitation for commercial, scientific, education, or private use of because of disease, predation or other facts; that such species are of ecological, scientific, educational, historical, economic, recreational and aesthetic value to the people of the state, and that the conservation, protection and enhancement of such species and their habitats are of state-wide concern. Therefore the General Assembly declares it is a policy of the state to conserve, protect, restore and enhance any endangered or threatened species and essential habitat."

²⁰ C.G.S. Sec. 26-310 provides in pertinent part: "Actions by state agencies which affect endangered or threatened species or species of special concern or essential habitats of such species. (a) Each state agency, in consultation with the commissioner, shall conserve endangered and threatened species and their essential habitats, and shall ensure that any action authorized, funded or performed by such agency does not threaten the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat designated as essential to such species, unless such agency has been granted an exemption as provided in subsection (c) of this section. In fulfilling the requirements of this section each agency shall use the best scientific data available. (b) Each state agency responsible for the primary recommendation or initiation of actions on land or in aquatic habitats which may significantly affect the environment, as defined in section 22a-1c, shall ensure that such actions are consistent with the provisions of sections 26-303 to 26-312, inclusive, and shall take all reasonable measures to mitigate any adverse impacts of such actions on endangered or threatened species or essential habitat. The Secretary of the Office of Policy and Management shall consider the consistency of such proposed actions with the provision of said sections 26-303 to 26-312, inclusive, in determining whether or not an environmental impact evaluation prepared pursuant to section 22a-1b satisfies the requirements of sections 22a-1a to 22a-1h, inclusive, and regulations adopted pursuant to said sections."

²¹ The JMB parties requested permission to visit the proposed cell tower site so that their experts could conduct field investigations, but they were not given permission to enter the site. (PFF 116)

in this proceeding, becomes the responsibility of the Siting Council, whose mandates include determining any potential adverse effects of the proposed tower on wildlife pursuant to both C.G.S. §§ 16-50p (a) (3) (B) and 26-310.

The Council on Environmental Quality expressed concern “about the proposed access drive and the potential environmental impacts associated with the loss of trees; root damage to the remaining trees adjacent to the proposed access drive; and the impacts to the edge habitats, which could be exposed to invasive species colonization.” (PFF 124) The information available to the Siting Council is insufficient to assess the effects of the proposed cell tower facility on plants and wildlife, and the applicants have failed to meet their burden of proof relative to the probable environmental impact of the facility to these resources.

E. The Construction and Operation of the Proposed Cell Tower Is Reasonably Likely to Unreasonably Impair the Public Trust in the Natural Resources of the State, and Feasible and Prudent Alternatives Exist

Upon the filing of an intervention petition, the agency first determines if it is reasonably likely that the project would cause unreasonable pollution, impairment, or destruction of the public trust in the natural resources involved,²² before it must consider whether there are alternatives to the proposal. *Paige v. Town Plan and Zoning Commission*, 235 Conn. 448, 463 (1995), citing *Red Hill Coalition, Inc. v. Town Plan and Zoning Commission*, 212 Conn. 727, 734–735 (1989). “Even minimal environmental

²² Water is a natural resource under CEPA because it is expressly mentioned in the Act. Inland wetlands and watercourses likewise constitute a “natural resource” under CEPA. C.G.S. § 22a–36; *Fromer v. Boyer-Napert Partnership*, 42 Conn.Sup. 57, 58, aff’d, 26 Conn. App. 185 (1991). Trees and wildlife have been held to be “natural resources” within the scope of C.G.S § 22a-19, so the impact of a project on trees and wildlife can be raised by a party intervening under the statute; *Paige v. Town Plan and Zoning Commission*, 235 Conn. 448, 454, 465 (1995); and must be considered by the Siting Council.

harm is to be avoided if, 'considering all relevant surrounding circumstances and factors, there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare.'" *Gardiner v. Conservation Commission*, 222 Conn. 98, 109 (1992), quoting General Statutes § 22a-19 (b).²³

The discussion above relating to the risks associated with the development of the proposed cell tower site in light of its highly erodible soils, shallow bedrock, steep topography and the extensive clearing which would be required, and its immediate proximity to inland wetlands, a watercourse, and a public drinking water supply reservoir, certainly support a finding by the Siting Council that the proposed cell tower facility is reasonably likely to have the effect of unreasonably impairing the public trust in the air, water and other natural resources of the state. (PFF 134)

Under these circumstances, feasible and prudent alternative analysis is required by the statute. There is record evidence as to three types of alternatives which should be considered by the Siting Council: siting the proposed tower at another location, utilizing a different method of construction (retaining walls) in the development of the tower facility, and relocating the tower and/or access road to a different part of the 1837 Ponus Ridge property.

1. Alternate Sites

The evidence at the public hearing demonstrates that the applicants significantly overstated their efforts to identify alternative locations for the proposed cell tower and

²³ C.G.S. § 22a-38 (17) provides that "Feasible" means able to be constructed or implemented consistent with sound engineering principles;" and § 22a-38 (18) provides that "Prudent" means economically and otherwise reasonable in light of the social benefits to be derived from the proposed regulated activity provided cost may be considered in deciding what is prudent and further provided a mere showing of expense will not necessarily mean an alternative is imprudent."

failed to consider feasible and prudent alternative sites identified by the JMB parties.

The applicants claim to have “identified and investigated twenty-four (24) sites in and around the New Canaan/Stamford site search area where the construction of a new tower might be feasible for radio frequency engineering purposes.” (PFF 135) Four of the sites included in their site search (3, 14, 15,17) are Class I Watershed Land owned by Aquarion Water Company and comprise part of the Centennial Watershed State Forest. (PFF 136) Five of the sites included in the site search (8, 11, 13, 16, 22) are owned by the State of Connecticut and comprise part of the Centennial Watershed State Forest. (PFF 137) Cell towers may not be located on water company lands or lands in State Forest. (PFF 138) So, rather than evaluating 24 potential alternative sites, the applicants identified only 16 sites which reasonably could have been considered alternatives.

The testimony of radiofrequency engineers from 360°RF established that alternative sites at 982 Oenoke Ridge Road, 40 Dans Highway and 40 River Wind Road appear to offer better coverage at similar or lower heights. (PFF 147) The property owners at 40 River Wind Road would be amenable to locating a cell tower facility on their property. (PFF 146) There already are public safety radio antennas at 982 Oenoke Ridge Road. (PFF 143) The 360°RF engineers further testified that towers at either of two vacant Oenoke Lane lots owned by Emily B. Nissley, the wife of Thomas Nissley, member of 1837 LLC, the owner of the proposed cell tower site, would provide good coverage for all the AT&T gaps identified in the application for the proposed 1837 Ponus Ridge Road cell tower site. (PFF 148) The applicants’ radiofrequency engineer agreed to provide the Siting Council with his analysis of the alternative sites proposed

by 360°RF, but no such analysis was ever provided. (PFF 149)

Utility poles represent viable alternative locations for the siting of cell phone antennas and are used throughout the country. (PFF 141) Utility pole locations for antennas are readily accessible in bad weather conditions and may be served by generators during power outages if battery power is insufficient. (PFF 142) Utility pole mounted antennas, individually or in combination, could provide similar or better coverage in northwestern and central western New Canaan, and, when in combination, would allow for less traffic loading than at a single site. (PFF 147)

The applicants summarily dismissed these alternatives.

2. Alternate Construction Methods

Alternative construction methods or relocation of the tower compound on the 1837 Ponus Ridge Road property could also significantly reduce the environmental impact of the proposed cell tower. The Council on Environmental Quality “recommend[ed] that the Applicant assess other opportunities to minimize the amount of earthwork associated with the construction of the proposed access drive, potentially including relocating the proposed access drive and/or tower compound.” (PFF 151) Several alternatives were discussed, all of which may be considered “prudent” and “feasible” under the statute.²⁴

A retaining wall could be used to lessen disturbance in the construction of the access road as proposed by the applicants, or it could be used to lessen disturbance in

²⁴ The applicant did not consider or present alternative designs for the proposed cell tower compound and access road on the 1837 Ponus Ridge Road property other than rotating the proposed site compound 90 degrees to be aligned in a northeast to southwest direction, which was done at the request of the Siting Council. (PFF 152)

conjunction with relocation of the tower compound and/or access road, which would address concerns about post-development stabilization. (PFF 154) A retaining wall would also allow a significant reduction in the number of trees to be removed. (PFF 162) Use of a retaining wall is a feasible design alternative to the construction of the access road to the tower compound as presently proposed. (PFF 155)

The applicants offered no site plans or designs utilizing retaining walls.

3. Relocation of Tower Compound and Access Road

The access road to the proposed cell tower could be modified to eliminate the switchback and to redirect the access road to run from the second stilling basin directly to the tower compound, thereby eliminating substantial disturbance and tree clearing and moving the facility farther away from the onsite inland wetland corridor and watercourse. (PFF 153) Additional excavation would be required to lower the elevation of the tower compound, but there was no testimony that the relocation was not feasible, viz., not “able to be constructed or implemented consistent with sound engineering principles.” C.G.S. § 22a-38 (17).

The cell tower compound could also be moved to a different location on the property at 1837 Ponus Ridge Road. The compound could be relocated off of the hilltop and moved westerly farther down the slope towards Ponus Ridge Road, which would reduce the area of disturbance and number of trees to be removed. (PFF 156) The applicants contended that if the compound were moved off the hilltop, “the additional required height and proximity to the road would make a facility at this location much more visible from Ponus Ridge Road. In addition, the entire facility would be constructed on an existing steep slope which would require a retaining wall over 100’ in length and

approximately 10' in height. This retaining wall would be very difficult to construct and result in a great deal of disturbance on the hillside. Overall, this location would likely result in greater impacts than the Proposed Facility location and the alternative location discussed in Response 9 below.” (PFF 157) However, the author of these statements was never identified, and no alternative plans were submitted substantiating these claims. The applicants’ civil engineer and wetlands scientist both testified at the public hearing that relocating the tower compound down the hill would lessen impact, not increase it.

The applicants’ engineer testified that siting the tower compound down the hill adjacent to the second stilling basin would result in “far less tree clearing” with no “significant change” in visibility (PFF 161) The applicants’ engineer testified that relocating the proposed tower compound off of the hilltop farther down the slope towards Ponus Ridge Road would be “constructible.” (PFF 158) The slope of the access driveway could be reduced to a 10 percent grade by lowering the proposed cell tower compound. (PFF 159).

The tower compound could also be located adjacent to the stone wall near the existing entrance driveway, essentially eliminating most of the disturbance associated with the access road. The applicants rejected this placement primarily because the height of the tower would have to be increased by 35 feet and it would be more visible from Ponus Ridge Road. (PFF 160) However, the absolute height of the tower, and its visibility from Ponus Ridge Road, is not the issue. Visibility from the Centennial Watershed State Forest and the neighboring residences to the east are the concerns, and bringing the tower down to the road would likely have no effect on the former and

significantly reduce the latter.

Although construction of the proposed cell tower compound adjacent to the stone wall near the existing entrance driveway or adjacent to the second stilling basin would be “harder to build than where [it’s] going currently” and would require a “significant retaining wall,” it could be constructed. (PFF 163) Placing the compound near the existing entrance driveway adjacent to the stone wall would result in less tree clearing, less disturbance and a reduction in impervious surface, and must also be considered a feasible and prudent location to the proposed cell tower facility as designed by the applicants. (PFF 164)

IV. CONCLUSION

The property at 1837 Ponus Ridge Road is extremely ill-suited for the development of the proposed cell tower. The soils on the site are highly erodible and shallow to bedrock. Significant deforestation is proposed on steep slopes above a wetland corridor and Laurel Reservoir. The potential for adverse impacts resulting from this type of activity is high. Blasting will likely be necessary for the access road, compound foundation, and underground utilities, raising additional erosion and sedimentation concerns and the possibility of acid rock drainage affecting the water quality of wells at nearby residences and Laurel Reservoir.²⁵ There are a number of listed species which may be impacted by the construction of the proposed cell tower facility for which the applicants have made no accommodation.

Given the substantial evidence in the record demonstrating that the

²⁵ There is a residence located a scant 250 ft. from the tower compound, the construction of which would almost certainly require blasting. (Applicants' Supplemental Submission, 08/31/22, Sheet SP-1)

construction and operation of the proposed tower is reasonably likely to adversely affect the onsite wetlands and watercourse and nearby Laurel Reservoir, will be visible from the Centennial Watershed State Forest along the shores of the Reservoir, and the availability of prudent and feasible alternatives, this application should be denied.

PARTIES MARK BUSCHMANN, TRUSTEE
AND JAMIE BUSCHMANN, TRUSTEE, AND
MARK BUSCHMANN, INTERVENOR

By S/ David F. Sherwood

David F. Sherwood
Moriarty, Paetzold & Sherwood
2230 Main Street, P.O. Box 1420
Glastonbury, CT 06033-6620
Tel. (860) 657-1010
Fax (860) 657-1011
dfsherwood@gmail.com
Juris No. 412152
Their Attorneys

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was electronically mailed to the following service list on October 27, 2022.

Lucia Chiocchio, Esq.
Kristen Motel, Esq.
445 Hamilton Avenue, 14th Floor
White Plains, New York 10601
lchiocchio@cuddyfeder.com
kmotel@cuddyfeder.com

Raymond Vergati
Manuel Vicente
Homeland Towers, LLC
9 Harmony Street, 2nd Floor
Danbury, CT 06810
rv@homelandtowers.us
[mv@homelandtowers.us](mailto:mvc@homelandtowers.us)

Rachelle Bidon-Lewis
Harry Carey
AT&T
84 Deerfield Lane
Meriden, CT 06067
rb9471@att.com
hc3635@att.com

Kenneth C. Baldwin, Esq.
Robinson & Cole LLP
280 Trumbull Street
Hartford, CT 06103-3597
kbaldwin@rc.com

Justin Nishioka
60 Squires Lane
New Canaan, CT 06840
Justin.nishioka@gmail.com

S/ David F. Sherwood
David F. Sherwood
Commissioner of the Superior Court